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THE FORMER GOVERNMENT ATTORNEY AND THE CODE OF PROFESSIONAL RESPONSIBILITY: INSULATION OR DISQUALIFICATION?

Government service has long had great appeal to lawyers who wish to acquire expertise in particular areas of the law before entering or returning to private practice. Even brief terms of public service can provide valuable learning experiences that enable attorneys to better represent clients before their former agencies. At the same time, because public service is so attractive, government agencies are able to recruit well qualified attorneys. Thus, this arrangement, which benefits lawyers, law firms, clients, and the government, has been encouraged, and lawyers have traditionally found it quite easy to move between public service and private practice.¹

There are, however, ethical considerations that arise when a government attorney moves into private practice. Canon 9 of the American Bar Association's Code of Professional Responsibility² admonishes attorneys to avoid even the appearance of impropriety. When an attorney leaves a government agency to represent clients before that agency, questions may be raised concerning improper influence³ or misuse of information to which the attorney

1. "Some firms 'freely permit and encourage' members to accept offers of employment in government service 'with the expectation (without any commitment) that they may some day return to the firm.'" D.C. COMM. ON LEGAL ETHICS, Tentative Draft Opinion to Inquiry No. 19, at 3 (July 12, 1976) [hereinafter cited as Tentative Opinion], quoting Letter from a senior partner of a Washington law firm to Lewis H. Van Dusen, Jr., Chairman ABA Committee on Professional Ethics (Apr. 24, 1975).

2. The Code of Professional Responsibility is divided into nine canons. Under each canon are ethical considerations (EC's) and disciplinary rules (DR's). The ethical considerations are "aspirational in character and represent the objectives toward which every member of the profession should strive." ABA CODE OF PROFESSIONAL RESPONSIBILITY, Preliminary Statement (1974). The disciplinary rules are "mandatory in character" and constitute the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action by the bar associations. *Id.* The provisions of the Code are given effect in the courts. See *Handelman v. Weiss*, 368 F. Supp. 258, 263 (S.D.N.Y. 1973) (the Code is primarily an aid in determining acceptable practices); *Kesselhaut v. United States*, No. 166-74, slip op. at 6 (Ct. Cl., Trial Div. Mar. 29, 1976), remanded, No. 166-74 (Ct. Cl., App. Div. Oct. 22, 1976) (en banc) (power to enforce the Code will be exercised whenever appropriate); *In re Meeker*, 76 N.M. 354, 357, 414 P.2d 862, 864 (1966), appeal dismissed, 385 U.S. 449 (1967) (courts must enforce the Code).

3. The charge of improper influence could be raised with respect to the attorney's

was privy while employed by the agency. Accordingly, Disciplinary Rule (DR) 9-101(B) bars a lawyer from accepting private employment in any matter in which he or she had substantial responsibility while a government employee.⁴ This rule, coupled with similarly directed federal statutes,⁵ requires the disqualification of attorneys in such instances and serves to avoid even the appearance of impropriety.

Normally, whenever any individual attorney is disqualified from handling a matter, all attorneys affiliated with him or her are likewise disqualified.⁶ The rule is based upon the realization that attorneys often have a close working relationship, sharing both information and fees. Since it is difficult to ensure that a disqualified attorney will render no assistance to his or her colleagues in the handling of a particular matter, the disqualification of all affiliated attorneys guarantees that no indirect benefit will be conferred when a direct benefit would otherwise be forbidden. Until very recently, however, it was never thought that the disqualification of an attorney, solely on the basis of former government service, should necessitate the disqualification of that attorney's law firm. This exception to the general rule helps to advance the public service tradition of the legal profession by facilitating the movement of attorneys between the public and private sectors.⁷ It also avoids disruption in some areas of the legal community by preventing wholesale disqualifications of certain firms and the attendant adverse effect on employment opportunities of government attorneys. In such instances it has been determined that the appearance of impropriety can be avoided adequately by requiring the firm to "insulate" the disqualified attorney from all contact

exercise of discretion while employed by the agency or his continuing relationship with former agency colleagues.

4. DR 9-101(B) states: "A lawyer shall not accept private employment in a matter in which he had substantial responsibility while he was a public employee." EC 9-3 clearly indicates that the rule is intended to prevent both actual impropriety and its appearance. Since actual misuse of influence or information is often exceedingly difficult to demonstrate, the guidepost of "appearance" is particularly appropriate in these matters.

5. 18 U.S.C. § 207(a) (1970) permanently bars a former public official from acting as agent or attorney for any party with respect to a matter in which he or she participated "personally and substantially" while a public official. 18 U.S.C. § 207(b) (1970) imposes a one-year ban on appearances by a former public official before a court, department, or agency as an agent or attorney for any party on any matter which was previously within his or her official responsibility. These provisions parallel DR 9-101 (B), but do not have any effect on the law firm of the barred attorney.

6. See DR 5-105(D) (1970). See also, e.g., *American Can Co. v. Citrus Feed Co.*, 436 F.2d 1125 (5th Cir. 1971); *Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp.*, 370 F. Supp. 581 (E.D.N.Y. 1973), *aff'd*, 518 F.2d 751 (2d Cir. 1975).

7. See Kaufman, *The Former Government Attorney and the Canons of Professional Ethics*, 70 HARV. L. REV. 657, 668 (1957).

with the case. These "insulation agreements," which sidestep the blanket rule of imputed disqualification, are widely used.⁸

Some significant ethical objections have been raised concerning this practice of insulating the former government attorney rather than disqualifying the law firm. The matter came to a head in 1974 when the disciplinary rule governing imputed disqualification was expanded by the ABA to require the disqualification of an entire law firm whenever any of its attorneys are disqualified from handling a matter for any reason whatsoever.⁹ Read in conjunction with DR 9-101(B), the new DR 5-105(D) has the apparent effect of disqualifying an entire law firm should any attorney in the firm have had substantial responsibility for that matter while a public servant. A literal construction of these two rules would preclude all insulation arrangements, thereby ending the unique treatment accorded law firms that employ former government attorneys. Whether these law firms will continue to enjoy this special treatment depends entirely on the interpretations given DR 5-105(D) and DR 9-101(B). Recently there has been considerable debate over the issue between two seemingly irreconcilable factions. In the view of some, the rules must be construed literally to require a blanket rule of firm disqualification in order to avoid the appearance of impropriety,¹⁰ while others contend that effective insulation agreements are a practical and adequate resolution of the competing interests involved.¹¹

8. A former general counsel of the National Labor Relations Board has estimated that insulation procedures prevented the disqualification of his new firm in some 300 to 400 matters. Moskowitz, *Can D.C. Lawyers Cut the Ties that Bind?*, JURIS DOCTOR, Sept., 1976, at 34, 35.

9. See ABA, Summary of Action and Report to the House of Delegates, 1974 Midyear Meeting 6 (Feb. 4-5, 1975). DR 5-105(D) now states: "If a lawyer is required to decline employment under a Disciplinary Rule, no partner, or associate, or any other lawyer affiliated with him or his firm, may accept or continue such employment."

10. The leading advocate of this position is Dean Monroe Freedman, former Chairman of the Legal Ethics Committee of the District of Columbia Bar. While Dean Freedman was Chairman, the Committee tentatively held that whenever an attorney is disqualified under DR 9-101(B), his entire firm is also disqualified under DR 5-105(D). See notes 61-66 & accompanying text *infra*. Although the Committee later narrowly rejected this approach, the controversy it engendered is significant because there is an exceptional amount of movement between the public and private sectors in the District of Columbia, and especially because the District of Columbia Bar claims that its rules apply to all proceedings before all federal agencies in the District of Columbia, even if the matter is handled by lawyers who are not members of the D.C. Bar. Moskowitz, *supra* note 8, at 34. For additional support for a blanket disqualification rule, see *Kesselhaut v. United States*, No. 166-74 (Ct. Cl., Trial Div. Mar. 29, 1976), *remanded*, No. 166-74 (Ct. Cl., App. Div. Oct. 22, 1976) (en banc); ETHICS COMM. OF THE BAR ASS'N OF MONTGOMERY COUNTY, OPINION No. 19 (June 21, 1976).

11. The primary advocates of this position include the American Bar Association

This article will address the ethical and practical considerations involved in the movement of attorneys between the public and private sectors. In doing so it will look at two aspects of the problem: the relevant disciplinary rules of the Code of Professional Responsibility, with emphasis on the dilemma created by the 1974 amendment to the Code, and the focal issue of whether insulation agreements are sufficient protection against abuse or, alternatively, if a blanket rule of law firm disqualification is necessary to avoid adequately the appearance of impropriety.

I. THE DISCIPLINARY RULES

A. DR 9-101(B)

DR 9-101(B) prohibits an attorney from accepting private employment in any matter in which he or she had substantial responsibility while a public employee.¹² Embodied in DR 9-101(B) is Canon 9's admonition that even the appearance of impropriety be avoided.¹³ Although most lawyers consider themselves able to maintain high professional standards regardless of the identity of their clients or of their own previous affiliations,¹⁴ their actions are viewed quite differently by an often cynical public. Many believe lawyers to be "opportunistic" and "prepared to betray yesterday's client for the sake of today's fee."¹⁵ This skepticism is exacerbated when a change from government service to private employment is involved, because in such a situation it is the government, and ultimately the public, which stands to be betrayed. Accordingly, DR 9-101(B) mandates that this appearance of impropriety be avoided by requiring the disqualification of the former government attorney.

One aspect of the appearance of impropriety that comes into play when a government attorney enters private practice stems from his or her knowledge of confidential agency policies¹⁶ relating to negotiation techniques, en-

Committee on Ethics and Professional Responsibility, *see* ABA COMM. ON ETHICS AND PROFESSIONAL RESPONSIBILITY, OPINIONS, No. 342 (1975); The New York City Bar Association Committee on Professional and Judicial Ethics, *see* note 51 *infra*; the Federal Bar Association, *see* Federal Bar Association, Press Release (Sept. 20, 1976); and the United States Department of Justice, *see* Letter from Antonin Scalia, Assistant Attorney General, to D.C. Comm. on Legal Ethics (Mar. 23, 1976), and U.S. Dep't of Justice, Interoffice Memorandum, Statutory and Ethical Restrictions on the Private Practice of Former Government Attorneys (May 5, 1969).

12. *See* note 4 *supra*.

13. ABA CODE OF PROFESSIONAL RESPONSIBILITY, Preamble (1974).

14. Tentative Opinion, *supra* note 1, at 12.

15. *Id.* at 13.

16. *See generally* ABA COMM. ON ETHICS AND PROFESSIONAL RESPONSIBILITY, OPINIONS, No. 342, at 5 (1975).

forcement practices, or litigation strategies.¹⁷ Any lawyer privy to this information has a potential advantage in future dealings with that agency. The attorney's prior position may also place him or her in a favored position with former colleagues in the agency. DR 9-101(B) will, however, bar only the use of these advantages in those matters for which the attorney had substantial responsibility while with the agency, and, since the Code does not forbid the use of these advantages in other matters, they are apparently not sufficient in and of themselves to raise that appearance of impropriety which the Code seeks to prevent. What DR 9-101(B) does forbid is the misuse of confidential information relating to a particular matter.

Another question raised in the movement from public to private practice is whether the attorney has abused the power of government office to further his or her own career.¹⁸ Many government attorneys deal on a day-to-day basis with private lawyers, some of whom are potential employers. Those who anticipate leaving the government at some point "are put under an inevitable pressure to impress favorably private concerns with which they officially deal."¹⁹ Conceivably it would be difficult for a government attorney to maintain the necessary adversary relationship in dealings with potential employers. To this extent, it has been suggested that "the greatest risks arising from post-employment conduct may well occur *during* the period of government employment, through the dampening of aggressive administration of government policies."²⁰ Although DR 9-101(B) prevents the former government attorney from working on a matter with which he or she has dealt directly while in government, it does not prohibit the attorney from ingratiating himself or herself with a future employer by manipulating some matters in order to gain the favor of that employer. Thus, taken alone, DR 9-101(B) is not intended to eliminate all such violations of the public trust. It only purports to cover the most direct abuses of power.

Short of forever barring attorneys from any practice whatsoever before their former agencies, there is no stricture by which the Code could undertake to eliminate abuses of power and misuse of information. Nonetheless, within the more modest and realistic scope of DR 9-101(B) are encompassed activities which can and should be prevented. It will, for example, effectively prevent a government attorney from bringing an action in which he or she intends to profit by future private involvement.²¹ An attorney may not insti-

17. Tentative Opinion, *supra* note 1, at 10.

18. *Id.* at 14.

19. ASSOCIATION OF BAR OF CITY OF NEW YORK, CONFLICT OF INTEREST AND FEDERAL SERVICE 234 (1960).

20. *Id.*

21. Tentative Opinion, *supra* note 1, at 14. A prosecutor cannot, for example, coerce

tute an action and later, in a private capacity, seek to either "uphold or upset"²² that action.

The scope of DR 9-101(B) is largely delimited by the phrases "substantial responsibility" and "the same matter."²³ Numerous factors enter into the determination of substantial responsibility, but the crucial one is the amount of actual knowledge the attorney has, or could have, of the facts. While any knowledge of specific facts is generally viewed as sufficient grounds for disqualification, actual knowledge is not absolutely essential to prove substantial responsibility if it reasonably appears the attorney might have received the information, or if it appears that there might be an abuse of power, since even the appearance of impropriety must be avoided.²⁴ The structure of the government agency, the size of the particular division, the length of the chain of command, the number of other positions existing both horizontally and vertically between the attorney in question and the person primarily responsible for the matter, and the relationship of the attorney in question to the

an individual into making admissions that could serve as the basis of future civil litigation. See ABA COMM. ON ETHICS AND PROFESSIONAL RESPONSIBILITY, OPINIONS, No. 135, *quoted in* *Allied Realty, Inc. v. Exchange Nat'l Bank*, 283 F. Supp. 464, 469 (D. Minn. 1968), *aff'd*, 408 F.2d 1099 (8th Cir. 1969).

22. ABA COMM. ON ETHICS AND PROFESSIONAL RESPONSIBILITY, OPINIONS, No. 37, *quoted in* *Hilo Metals Co. v. Learner Co.*, 358 F. Supp. 23, 28 (D. Hawaii 1968).

23. Prior to the adoption of the Code of Professional Responsibility, Canon 36 of the old Canon of Ethics barred an attorney from accepting private employment in any matter which he had "investigated or passed upon" while employed by the government. See ABA CANONS OF PROFESSIONAL ETHICS No. 36. This rule was not only unnecessarily broad, but also proved to be excessively ambiguous. Significant difficulties in defining the terms "investigated" and "passed upon" demonstrated the necessity of amending the language of Canon 36 when the Code of Professional Responsibility was written in 1970. See, e.g., *United States v. Standard Oil Co.*, 136 F. Supp. 345 (S.D.N.Y. 1955); ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 26 (1930). Canon 36 was transformed into DR 9-101(B) of the new Code. As a disciplinary rule, it established a minimum level of ethical conduct, any violation of which is subject to disciplinary action. The Code does not prescribe penalties for transgressions of the disciplinary rules; these are generally determined by the court and the bar association responsible for enforcing the rule. See note 2 *supra*.

24. "Moreover, the court need not, indeed cannot, inquire whether the lawyer did, in fact, receive confidential information [If] 'it can reasonably be said that in the course of the former representation the attorney *might* have acquired information related to the subject matter of the subsequent representation,' it is the court's duty to order the attorney disqualified." *Emle Indus., Inc. v. Patentex, Inc.*, 478 F.2d 562, 571 (2d Cir. 1973), *quoting* *T.C. & Theatre v. Warner Bros. Pictures*, 113 F. Supp. 265, 269 (S.D.N.Y. 1953). See *Hull v. Celanese Corp.*, 513 F.2d 568, 572 (2d Cir. 1975); *United States v. Trafficante*, 328 F.2d 117, 120 (5th Cir. 1964); *Hilo Metals Co. v. Learner Co.*, 253 F. Supp. 23, 27 (D. Hawaii 1966). Disqualification may be required even if the information that triggers the disqualification is available to the client through other sources. See *Fleisher v. A.A.P. Inc.*, 163 F. Supp. 548, 551 (S.D.N.Y. 1958), *appeal dismissed*, 264 F.2d 515 (2d Cir.), *cert. denied*, 359 U.S. 1002 (1959).

person with primary responsibility are all relevant considerations. The relative importance of the particular matter is also significant, since the greater its importance, the more likely it is that more attorneys have had substantial responsibility in its handling. Major matters could implicate many, whereas routine ones would affect but a few.²⁵ Thus, the ultimate determination of whether an attorney has had responsibility sufficient to warrant disqualification is the product of a myriad of considerations.²⁶

The scope of DR 9-101(B) is as dependent upon the definition of the phrase "the same matter" as it is on the definition of "substantial responsibility." In general, a "matter" is defined as a "discrete and isolatable transaction or set of transactions between identifiable parties."²⁷ If the "facts, acts or circumstances"²⁸ giving rise to the attorney's involvement in both the public and private sectors are similar, then the matter is likely to be the same even though very different claims or legal theories may be asserted.²⁹ Owing to the vast array of factual situations covered by the rule the phrase is not susceptible to more precise definition. It has, however, been interpreted broadly,³⁰ so as to be consistent with Canon 9's dictate that even the appearance of impropriety must be avoided.

B. DR 5-105(D)

Prior to 1974, DR 5-105(D) required that the law firm of a disqualified attorney disqualify itself only when the reason for the attorney's withdrawal

25. See *Kesselhaut v. United States*, No. 166-74, slip op. at 28 (Ct. Cl., Trial Div. Mar. 29, 1976), *remanded*, No. 166-74 (Ct. Cl., App. Div. Oct. 22, 1976) (en banc).

26. There remains some dispute as to what degree of involvement constitutes "substantial responsibility." The ABA Standing Committee on Ethics and Professional Responsibility states that the attorney must be "personally involved to an important, material degree." ABA COMM. ON ETHICS AND PROFESSIONAL RESPONSIBILITY, OPINIONS, No. 342, at 14 (1975). On the other hand, the Committee on Legal Ethics of the District of Columbia Bar has stated that substantial responsibility does not "necessarily require a showing of actual, personal participation." D.C. COMM. ON LEGAL ETHICS, OPINION No. 16 (1976).

27. ABA COMM. ON ETHICS AND PROFESSIONAL RESPONSIBILITY, OPINIONS, No. 342, at 9 n.19 (1975), *quoting* B. MANNING, *FEDERAL CONFLICT OF INTEREST LAW* 204 (1964).

28. *Kesselhaut v. United States*, No. 166-74, slip op. at 23 (Ct. Cl., Trial Div. Mar. 29, 1976), *remanded*, No. 166-74 (Ct. Cl., App. Div. Oct. 22, 1976) (en banc).

29. *City of New York v. General Motors Corp.*, 60 F.R.D. 393, 402 (S.D.N.Y. 1973), *rev'd on other grounds*, 501 F.2d 639 (2d Cir. 1974).

30. See, e.g., *United States v. Trafficante*, 328 F.2d 117, 119-20 (5th Cir. 1964); *Kesselhaut v. United States*, No. 166-74, slip op. at 12 (Ct. Cl., Trial Div. Mar. 29, 1976), *remanded*, No. 166-74 (Ct. Cl., App. Div. Oct. 22, 1976) (en banc). See also D.C. COMM. ON LEGAL ETHICS, OPINION No. 16, at 3 (1976).

was that his or her "independent judgment" had been impaired.³¹ Originally intended to keep different members of the same firm from representing opposing parties, the rule was broadened in 1974 to require that a firm disqualify itself whenever one of its attorneys was forced to withdraw under *any* disciplinary rule. Consequently, when an attorney now is disqualified from a case due to prior involvement as a public employee under DR 9-101(B), DR 5-105(D) would appear to mandate disqualification of his or her law firm as well.³² In effect, if the two rules are literally construed, law firms employing disqualified government attorneys are no longer excepted from the general rule that an attorney's withdrawal from a case necessitates the entire firm's withdrawal.

The scope of the disqualifying rule is potentially great, in that DR 9-101(B) has been broadly interpreted.³³ A literal interpretation of DR 5-105(D) as applied to DR 9-101(B) could have a great impact on the recruitment practices of law firms that specialize in administrative practice before particular government agencies.³⁴ Such firms have traditionally benefited from the expertise of attorneys with previous internal agency experience. A recently hired attorney may well have been exposed to cases within an agency that are handled by the firm, especially if the firm

31. Prior to amendment, disqualification of law firms was keyed to DR 5-105, which forbids an attorney "to accept or continue employment if the interests of another client may impair the independent judgment of the lawyer." ABA CODE OF PROFESSIONAL RESPONSIBILITY (1970) (amended 1974).

32. There is very little legislative history accompanying this amendment, and what history there is indicates that the impact of the amendment was not foreseen. The ABA Standing Committee on Ethics and Professional Responsibility, which proposed the amendment, noted only that it was "self explanatory" and was made in response to "problems we found with [the Code] in the course of our normal work." Summary of Action and Report to the House of Delegates, *supra* note 9, at 8. It appears that the Committee did not intend to amend DR 5-105(D) in the way which was actually proposed. In its report, the Committee noted proposed changes of DR 5-105(D) by underscoring the parts to be changed. It underscored the portion of the rule that added the words "or any other lawyer affiliated with [the disqualified lawyer] or his firm." However, it did not underscore that portion broadening the ban to include attorneys disqualified under any disciplinary rule rather than just those disqualified under DR 5-105(D). *Id.* Lewis H. Van Dusen, Jr., chairman of the committee, candidly admits that the impact the amendment would have on former government attorneys who entered private practice was unexpected. Moskowitz, *supra* note 8, at 34.

33. "[I]n the disqualification situation, any doubt is to be resolved in favor of disqualification." *Hull v. Celanese Corp.*, 513 F.2d 568, 571 (2d Cir. 1975). See notes 24 & 30 *supra*.

34. See note 8 *supra*. A former Federal Power Commission chairman claims that it was six years after he resigned before he could handle matters before that Commission. Moskowitz, *supra* note 8, at 35. Under a literal interpretation, his entire firm would have been similarly barred.

is a large one. Whenever the attorney has had substantial responsibility in one of these matters, the law firm will be faced with a difficult decision. It must cease its involvement in the matter, discharge the attorney, or face possible disciplinary action or eventual ouster by a court.

The government itself will also be adversely affected by such a blanket rule of disqualification. Prospective government attorneys will recognize the employment difficulties they might have in leaving government service, and some may choose not to enter public service for this reason. Those who do decide to join the government with an eye toward future employment in the private sector may be reluctant to become involved in large scale legal matters and may choose to leave government service to avoid contact with such matters,³⁵ since any attorney participating in a large case could be effectively precluded from practicing his specialty in the private sector for a significant period of time.

The effect of the blanket rule, however, is probably greatest upon the government attorneys themselves. Many will find their employment prospects in the private sector drastically curtailed, depending upon the extent of their knowledge and their potential employer's clientele.³⁶ Few firms would be willing to give up a client in order to hire an "infected" attorney, no matter how valuable that attorney might otherwise be.³⁷ In short, a blanket rule of disqualification of the law firm could have a devastating impact on the longstanding tradition whereby attorneys move easily between the public and private sectors.

II. INTERPRETATION OF THE DISCIPLINARY RULES

A. *Insulation Agreements*

By and large, the legal community has rejected the notion that the expansion of DR 5-105(D) necessitates a blanket rule of disqualification. Rather, firms which hire a former government attorney who is disqualified under DR 9-101(B) from a particular case currently handled by the firm have continued their practice, often already required by internal agency rules, of insulating that attorney from all contact with the case. Law firms

35. See Moskowitz, *supra* note 8, at 37.

36. To this extent, the effect of the blanket rule will be greatest upon attorneys in those government agencies that supervise a finite number of matters on an ongoing basis. Attorneys in these regulatory agencies may deal regularly with most, if not all, of the companies in a particular field. See note 34 *supra*. If so, they may be disqualified from an extraordinary number of matters under DR 9-101(B); a literal interpretation of DR 5-105(D) would make them virtually unemployable in the private sector.

37. See Moskowitz, *supra* note 8, at 35.

generally consider insulation to be an adequate alternative to the blanket rule under which the entire firm would be disqualified.³⁸ They urge that effective insulation of the infected attorney will avoid the appearance of impropriety without unreasonably restricting the employment prospects of government attorneys or impairing the recruiting efforts of the government.³⁹ Furthermore, because the law firms would not have to withdraw from certain matters it is contended that insulation does much to protect the attorney-client relationship.⁴⁰

Insulation involves both effective separation of the attorney from the particular matter and warranty by the firm to the agency and to any court involved that the insulation will avoid the appearance of impropriety. If the agency and court agree that the plan is sufficient,⁴¹ the firm may continue its representation in the matter as long as it abides by its insulation agreement. The Justice Department has formulated guidelines which delineate the government's concept of effective insulation.⁴² First, the firm must completely isolate the attorney from all contact with the particular matter. He or she is forbidden from discussing it with anyone in the firm, including nonlegal personnel, and all employees of the firm must be so instructed. Second, there must be a "reasonable basis" upon which the government can conclude that the insulation will be effective. This determination is based upon such factors as the size of the firm and the ability of the remaining attorneys to handle the matter competently. Third, the infected attorney may not share in any of the fees derived from the matter. Finally, it is recommended, though not required, that the firm's involvement in the matter have been

38. Letter from Lloyd N. Cutler, Wilmer, Cutler & Pickering, to D.C. Comm. on Legal Ethics (Dec. 2, 1975); Letter from John B. Jones, Jr., Covington & Burling, to D.C. Comm. on Legal Ethics (Nov. 21, 1975); Letter from Robert L. Wald, Wald, Harkrader & Ross, to D.C. Comm. on Legal Ethics (Mar. 18, 1976); Letter from Sturgis Warner, Jones, Day, Reavis & Pogue, to D.C. Comm. on Legal Ethics (Mar. 18, 1976).

39. Letter from Lloyd N. Cutler, Wilmer, Cutler & Pickering, to D.C. Comm. on Legal Ethics (Dec. 2, 1975).

40. See ABA COMM. ON ETHICS AND PROFESSIONAL RESPONSIBILITY, OPINIONS, NO. 342, at 5 (1975).

41. In the event that no court is involved in the adjudication, the agency itself becomes vested with sole discretion to approve or disapprove the insulation agreement. Recent experience has shown, however, that the agency may not always be a disinterested decisionmaker and it has been suggested that "some entity other than the immediate government agency concerned should have a role in the waiver or consent process." D.C. COMM. ON LEGAL ETHICS, ACTION INQUIRY NO. 19 (Dec. 1, 1976) (Memorandum). The Legal Ethics Committee of the District of Columbia Bar has instructed its Code subcommittee to consider the promulgation of standards and criteria for the waiver decision, possibly incorporating a third party decisionmaker and requiring that the decision be made on the public record. *Id.* See notes 61-66 *infra*.

42. Letter from Antonin Scalia, *supra* note 11.

initiated prior to the hiring of the attorney. This last guideline has the purpose of ensuring that the client did not approach the firm because of the particular attorney's former position.

Insulation agreements, as an alternative to a blanket rule, have been specifically endorsed by the American Bar Association. Soon after DR 5-105(D) was amended to require that a law firm disqualify itself if one of its members were disqualified under any disciplinary rule, the ABA's Ethics Committee was called upon to determine whether the rule change mandated the blanket disqualification of a firm whenever one of its attorneys was disqualified under DR 9-101(B) or if insulation of the attorney would be an acceptable alternative. In *Formal Opinion 342*,⁴³ the Committee explored the policy considerations behind DR 9-101(B), as well as the adverse ramifications of a literal construction of DR 5-105(D) and concluded that the goals of DR 9-101(B) could be met by a "less stringent" application of DR 5-105(D).⁴⁴ If a firm makes its own independent determination that the particular circumstances will not give rise to a significant appearance of impropriety,⁴⁵ and the attorney is insulated from all contact with fees generated by the case "to the satisfaction of the government agency concerned,"⁴⁶ then insofar as the ABA is concerned no disciplinary rule has been violated.

Although the opinion shows some concern for avoiding the appearance of impropriety, it states that such avoidance is only one, and not the most important, policy consideration behind DR 9-101(B).⁴⁷ There appears to be little support for this contention.⁴⁸ Canon 9, from which the rule is derived, bars even the appearance of impropriety and renders questionable the ABA's approval of insulation agreements whenever there is "no appearance of significant impropriety affecting the interests of the government."⁴⁹ The ABA's tolerance of certain "less than significant" appearances

43. ABA COMM. ON ETHICS AND PROFESSIONAL RESPONSIBILITY, OPINIONS, No. 342 (1975). The opinion was one of general scope, and "was not addressed to a particular case." *Kesselhaut v. United States*, No. 166-74, slip op. at 27 (Ct. Cl., Trial Div. Mar. 29, 1976), *remanded*, No. 166-74 (Ct. Cl., App. Div. Oct. 22, 1976).

44. ABA COMM. ON ETHICS AND PROFESSIONAL RESPONSIBILITY, OPINIONS, No. 342, at 11 (1975).

45. *Id.* at 12.

46. *Id.*

47. *Id.* at 3.

48. The Preamble of the Code of Professional Responsibility states that disciplinary rules are derived from the general concepts embodied in the Canons. Since DR 9-101(B) is derived from Canon 9, which states that a lawyer should avoid even the appearance of impropriety, the overriding policy consideration should be just that. Any policy consideration underlying DR 9-101(B) is, by definition, based upon Canon 9.

49. ABA COMM. ON ETHICS AND PROFESSIONAL RESPONSIBILITY, OPINIONS, No. 342, at 8-12 (1975).

of impropriety stands in marked contrast to Canon 9 and to a substantial body of case law⁵⁰ and is of dubious wisdom in an area in which actual impropriety will be particularly difficult to detect.⁵¹

Moreover, it is arguable that current insulation practices do not effectively avoid even significant appearances of impropriety. One major difficulty is that it is the government agencies which will primarily determine the acceptability of the agreements. The agencies are quite favorably disposed toward insulation pacts. Some have promulgated regulations authorizing such agreements between themselves and their former employees,⁵² and those which have no specific regulations appear willing to consent to insulation on an ad hoc basis.⁵³ In the view of the Justice Department, the government should routinely consent to insulation agreements when the firm's involvement with the client antedates the hiring of the attorney.⁵⁴

Although the willingness of the government to enter into insulation agreements stems in large part from a valid concern over the harmful effects that a blanket disqualifying rule would have upon its own recruiting efforts,⁵⁵ it is arguable that this willingness is also due to the practical convenience of insulation agreements. By agreeing to insulation and waiving a firm's

50. See, e.g., *United States v. Trafficante*, 328 F.2d 117 (5th Cir. 1964):

The Preamble to the Canons of Ethics admonishes the members of the bar that their conduct should be such as to merit the approval of all good men. That conduct should not be weighed with hair splitting nicety. We have found no exceptions to the exhortation to "abstain from all appearance of evil."

Id. at 120, quoting 1 THESSALONIANS 5:22.

51. The New York City Bar Association's Committee on Professional and Judicial Ethics has also considered the issue and has concluded that the practical difficulties of a rule requiring automatic disqualification outweigh the ethical arguments in favor of such a rule. The committee expressed its basic approval of *Formal Opinion 342* but indicated that the ultimate discretion to waive disqualification should not be vested in the government agency, because of the agency's potential bias in favor of disqualification. Instead the Committee urged that administrative and legal remedies be preserved. NEW YORK CITY BAR ASSOCIATION, OPINION 889 (Dec. 5, 1976). The ABA opinion, however, does not foreclose access to administrative and legal remedies.

52. See, e.g., 16 C.F.R. § 4.1b(4) (1975) (Federal Trade Commission); 46 C.F.R. § 502.32(c) (1975) (Federal Maritime Commission).

53. See, e.g., *In re RKO General, Inc.*, No. 18759 (F.C.C., June 1, 1976). The Securities and Exchange Commission accepts insulation agreements in well over half of the marginal disqualification cases it is asked to rule upon. See Moskowitz, *supra* note 8, at 35.

54. U.S. Dep't of Justice, Interoffice Memorandum, *supra* note 11. The Justice Department is on record as supporting the special exception to the general rule of imputed disqualification. See Letter from Antonin Scalia, *supra* note 11. Its representative appeared before the ABA Ethics Committee to advocate this position during the Committee's deliberations that led to *Formal Opinion 342*. See Letter from Lloyd N. Cutler, *supra* note 38.

55. Letter from Antonin Scalia, *supra* note 11.

disqualification under DR 5-105(D), the agency is able to avoid a separate legal battle over the disqualification issue. While this procedure avoids diversion of sometimes meager legal resources, there is some question of whether the public trust is being adequately considered. A serious problem is the possibility that attorneys charged with the responsibility of making the insulation decisions on behalf of their agencies may imprudently consent to the agreements, realizing that a strict rule of disqualification could damage their own future employment prospects.

The agencies' amenability to insulation agreements is exemplified by a recent Federal Communications Commission ruling which waived the disqualification of a law firm after a former FCC Commissioner who joined the firm was disqualified under DR 9-101(B).⁵⁶ In moving for the firm's disqualification, opposing counsel had alleged that the former Commissioner remained uninsulated for a period of 11 months after he joined the firm, and, in fact, had discussed the matter with the firm's client and told opposing counsel that he hoped to handle the matter personally. The FCC dismissed the allegations as unsupported by "adequate evidence."⁵⁷ Even assuming that the charge of impropriety was not factually supported, the allegations certainly raised an appearance of impropriety which arguably met the ABA's "significant appearance" criteria. The FCC, however, addressed itself not to appearance but to whether the impropriety actually had occurred. This decision indicates that agencies may be unable to make ethical, as opposed to factual determinations,⁵⁸ raises serious doubts as to whether the agencies will subject insulation agreements to close and impartial scrutiny, and demonstrates how insulation agreements may actually serve to promote the appearance of impropriety.⁵⁹

B. *The Blanket Rule of Disqualification*

The infirmities inherent in insulation agreements present a strong argument for a literal interpretation of the disciplinary rules and the enforcement of a blanket rule of disqualification. Adherents of this position assert that insulation agreements serve only to prevent inconvenience to the government agencies and financial loss to certain lawyers and law firms, while impairing

56. *In re RKO General, Inc.*, No. 18759 (F.C.C., June 1, 1976).

57. *Id.* at 8.

58. A major difficulty inherent in allowing the agency to make the insulation decision is that this procedure necessitates the resolution of a legal ethics issue by an entity not designed to deal with legal ethics.

59. Tentative Opinion, *supra* note 1, at 20.

the "integrity of the administration of justice."⁶⁰ Among the proponents of this blanket rule is a minority of the Committee on Legal Ethics of the District of Columbia Bar Association. The Committee, when recently presented with the identical question posed to the ABA Ethics Committee, at first tentatively rejected the proposition that insulation agreements sufficiently comply with the disciplinary rules.⁶¹ Since then the Committee has refused, by a very narrow margin, to adopt its original position,⁶² but the tentative opinion remains as a strong dissent to the otherwise almost universal acceptance of insulation procedures.

The drafters of the unadopted opinion appeared satisfied that insulation agreements would be reasonably effective in preventing government attorneys from abusing their power in order to enhance a subsequent career in the private sector.⁶³ They were not convinced, however, that insulation agreements could prevent favoritism being shown to the attorney or to his or her law firm by former government colleagues, nor that the agreements could dispel the appearance that the law firm had gained unfair advantage because of the attorney's knowledge of agency secrets.⁶⁴ Because of

60. Letter to the Editor from Monroe Freedman, Wash. Post, July 24, 1976, at A-18, col. 4.

61. This opinion was a tentative response to an inquiry involving two former government attorneys. One had been an administrative officer with a federal agency; the other had been a lawyer with the same agency. While both were with the agency, a 10-year service contract was negotiated between the agency and a private corporation. The lawyer testified that he probably had approved the legal sufficiency of the contract, although he was not absolutely certain that he did so. The administrative officer routinely recommended and signed the contract. After both had joined the same law firm, the parent company of the private corporation involved in the original contract retained the firm. Included in the retainer arrangement was the negotiation of a proposed new contract to replace the expiring one. The tentative opinion held that the entire firm was disqualified from handling the matter. The result reached was especially interesting in that the D.C. Bar has not incorporated the 1974 amendment to DR 5-105(D) into its own Code of Professional Responsibility; thus, even a literal interpretation of the D.C. Code would not necessitate a blanket disqualifying rule. The Committee noted that it had not yet acted upon the amendment and stated that it chose to defer consideration of the proposed amendment until after the "resolution of the present inquiry." Tentative Opinion, *supra* note 1, at 6. The reason for such procedural maneuvering was not explained. The fact that the amendment to DR 5-105(D) had not been incorporated left the tentative opinion without a solid base.

62. At its October 26, 1976 meeting, the Committee concluded that, because the tentative opinion was one of such broad scope, an absolute majority of the 19 members then in office would be required for final adoption. The vote on the opinion, announced at the Committee's December 1, 1976 meeting, was eight in favor, seven opposed, three abstentions, and one absent. The opinion, therefore, failed to be adopted by two votes. D.C. COMM. ON LEGAL ETHICS, ACTION ON INQUIRY 19 (Dec. 1, 1976) (Memorandum).

63. Tentative Opinion, *supra* note 1, at 16.

64. *Id.* at 16-17.

these reservations, and a recognition of the demonstrated inability of government agencies to make impartial insulation decisions,⁶⁵ the drafters urged that the purposes of DR 9-101(B) could only be realized by a blanket rule of disqualification.⁶⁶

Other support exists for the proposition that insulation agreements do not adequately comply with the Code. The Ethics Committee of the Bar Association of Montgomery County, Maryland, has reached a similar conclusion, holding that the law firm of a former public zoning official who had once denied an application for the rezoning of a tract of land could not represent the same applicant in another attempt to have the land rezoned.⁶⁷ The opinion stated that DR 5-105(D) on its face makes no exceptions for former government attorneys.⁶⁸ Although the Montgomery County Ethics Committee recognized the importance of an individual's right to his own freely chosen counsel⁶⁹ and stopped short of holding that the blanket rule of disqualification applied in every situation,⁷⁰ it refused to embrace the ABA's approval of insulation agreements.

The United States Court of Claims, which handles a significant number of cases involving government agencies, has also recognized that insulation is not always effective. In *Kesselhaut v. United States*,⁷¹ the court refused to waive the disqualification of a law firm despite the fact that the former government attorney had been insulated. The court carefully considered the impact of DR 9-101(B) and DR 5-105(D) on the facts of the case, con-

65. *Id.* at 20.

66. One advocate of the tentative opinion enthusiastically suggested that it would "put a big dent in the practice of law through 'connections' and would go a long way toward having a system where disputes are resolved on the merits, not on who the lawyers are." Marna Tucker, Editor of the Tentative Draft Opinion to Inquiry No. 19, *quoted in* Wash. Post, July 8, 1976, at A-1, col. 4, A-8, col. 2. Although this is a noble goal, it is probably naive to assume that it would be achieved by the adoption of the blanket rule. The "connections" necessary to practice "law through connections" are usually longstanding personal relationships which will remain unaffected by the blanket rule. Law firms do not hire government attorneys in order to glean inside information about a particular case; government attorneys are hired because they know their way around a particular agency. Attorneys may have numerous agency connections and be privy to many agency secrets, yet be untouched by the blanket rule because they have not had substantial responsibility over particular matters.

67. ETHICS COMM. OF THE BAR ASS'N OF MONTGOMERY COUNTY, OPINION NO. 19, (June 21, 1976).

68. *Id.* at 5.

69. *Id.* at 6-7.

70. The committee left open the question of when the blanket rule would not apply and limited its opinion to the particular facts involved.

71. No. 166-74 (Ct. Cl., Trial Div. Mar. 29, 1976), *remanded*, No. 166-74 (Ct. Cl., App. Div. Oct. 22, 1976) (en banc).

cluding that the firm could not continue its representation and still avoid the appearance of impropriety. Although the Justice Department in this case objected to the continued representation of the law firm, the court stated that it would have required the firm's disqualification even if the Justice Department had not objected.⁷² *Kesselhaut* indicates, therefore, that courts will make independent determinations of the effect of the disciplinary rules and may construe them literally to require a blanket rule of disqualification.

III. CONCLUSION

As is evident from the previous discussion, there are valid arguments favoring both interpretations of the disciplinary rules, and substantial evidence exists in support of each view. While it cannot be gainsaid that a blanket rule would create upheaval in certain areas of the legal community, neither can it be denied that experiences with insulation have been less than satisfactory. The choice between the two ultimately comes down to the larger question: Are we to allow an exception to a strong ethical principal solely because of the practical hardships that would otherwise result? From an ethical as well as a practical point of view, the answer must be no.

The Code of Professional Responsibility is clear in its requirement of the disqualification of an entire law firm upon the withdrawal of any associated attorney for any reason. Canon 9's mandate is unequivocal: even the appearance of impropriety must be avoided. The rule is in no way conditioned upon a lawyer's ability to avoid personal sacrifice. The proper inquiry is not into hardship, but into appearance.⁷³ Does a law firm's continued involvement in a matter, despite the disqualification of one of its attorneys, carry with it the taint of impropriety? In the absence of insulation, even the most vehement opponents of the blanket rule would be hard-pressed to respond in the negative. The next question is: does insulation alleviate this

72. The *Kesselhaut* court stated that continued representation by the firm would "damage the public confidence in the integrity of the government legal service and the judicial process," *id.* at 35, because it would appear that the attorney was taking advantage of agency secrets or had used his influence while with the agency so as to "ground a future lawsuit in which he might be employed." *Id.* at 36. Accordingly, the court held that no amount of insulation of the attorney could overcome the appearance of impropriety.

Kesselhaut was remanded by the Appellate Division of the Court of Claims for more detailed findings on the involvement of the attorney in the matter while he was with the agency, his subsequent insulation from the matter, and the nature and circumstances of the retainer agreement between the law firm and the company. No. 166-74 (Ct. Cl., App. Div. Oct. 22, 1976) (en banc).

73. Similarly, the inquiry is better directed at the appearance of impropriety rather than at its actuality.

taint? The answer, based on experience with insulation to date, again must be an emphatic no.

In the final analysis, the only valid argument against the blanket rule is that it will create undue hardships for certain segments of the legal community. This criticism, however, is as much an indictment of the present interpretations of DR 9-101(B) as it is of the blanket rule. Specifically, complaints might be better directed at the broad definitions of the terms "substantial responsibility" and "the same matter." Interpretations of these terms have transcended the guidelines of Canon 9 and could be more narrowly defined without infringing upon the admonition against the appearance of impropriety.⁷⁴ Cast in a more reasonable light, DR 9-101(B) would require fewer individual disqualifications, thereby leading to fewer firm disqualifications under the blanket rule.

Two final points should be made with respect to the practical effects of a blanket rule of disqualification. It is by no means certain that the long-term disruptive impact on the legal community of such a rule would be of major proportions. Some reshuffling of matters, and even of attorneys, among law firms would certainly result, and some government attorneys might well be restrained from joining private firms until particular matters are concluded. If current inbreeding in the legal community is so pervasive as to lend credence to the dire predictions that have been made with respect to the blanket rule, then perhaps a healthy restructuring is long overdue.

Moreover, it is possible that the blanket rule would in fact promote a more dedicated caliber of government attorney. While the rule would likely affect the government's recruiting efforts and could discourage some government attorneys from becoming involved in large scale matters, this impact would be restricted to those attorneys who consider government service a mere stepping stone to eventual private sector employment.⁷⁵ Without disparaging the motives of such attorneys, it may nonetheless be suggested that the government career-oriented lawyer with a commitment to the policies and

74. Under DR 9-101(B), an individual disqualification can result if an attorney might have merely acquired information and that information would be available to the client through other sources. See note 24 & accompanying text *supra*.

75. The government itself is becoming concerned with the problem of short-term government service and in some instances has begun imposing a minimum length of service upon incoming government attorneys. The Carter administration is requiring that top appointees agree in writing to a four year commitment and that regulatory agency nominees serve a full appointive term. *Conflict-of-Interest Guidelines Set for Carter Appointees*, Wash. Post, Dec. 11, 1976, at A-4, col. 1. Similarly, the National Labor Relations Board now requires that its attorneys pledge themselves to at least three years of service with the Board. *NLRB Lawyers Charge Agency With Unfair Labor Practices*, Wash. Post, Dec. 11, 1976 at A-1, col. 2.

functions of his or her agency is likely to be the more desirable public servant. In an age of burgeoning law school enrollment and intense job competition, the quality of government attorneys need not suffer, and may well improve.

IV. POSTSCRIPT

In spite of the foregoing, the prospects for adoption of the blanket rule are not good. The issue will be resolved by those lawyers who sit on the bench and the ethics and disciplinary committees, and most lawyers who have expressed an opinion on the subject have rejected the blanket rule in favor of the insulation alternative.

Should the insulation agreement carry the day, it is nonetheless to be hoped that the airing of this controversy will have an effect upon the conduct of attorneys, law firms, and agencies confronted with the situation at issue. The disciplinary rules, by definition, establish only the minimum level of acceptable conduct, and the Code cautions that "[e]ach lawyer must find within his own conscience the touchstone against which to test the extent to which his actions should rise above minimum standards."⁷⁶ Accordingly, the standards for insulation should be rigorous and the requirements of insulation agreements meticulously observed. More importantly, each lawyer consenting to, or involved in, an insulation pact must determine for himself or herself that the agreement will effectively avoid any appearance of impropriety.

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76. ABA CODE OF PROFESSIONAL RESPONSIBILITY, Preamble (1974).